BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD J. PENCE	)	
Claimant	)	
	)	
VS.	)	
	)	
RESCAR, INC.	)	
Respondent	)	Docket No. 1,015,047
	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INS. CO.	)	
ZURICH INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and its carrier, St. Paul Fire & Marine Insurance Company (St. Paul) requested review of the August 17, 2006 Award by Special Administrative Law Judge (SALJ) John Nodgaard. The Board heard oral argument on November 28, 2006.

APPEARANCES

R. Todd King, of Wichita, Kansas, appeared for the claimant. John David Jurcyk, of Roeland Park, Kansas, appeared for respondent and St. Paul. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and its insurance carrier Zurich Insurance Company (Zurich).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed to the following:

1. Claimant sustained a 25 percent functional whole body permanent partial impairment as a result of his work-related injury;
2. Neither party disputes the period of temporary total disability benefits (TTD) ordered by the SALJ;
3. Neither party disputes the propriety of either the SALJ or the Board considering Exhibit 4 from Dr. Grundmeyer's deposition;
4. There is no dispute as to the weekly value of claimant's fringe benefits ($107.11) and that they ceased as of August 6, 2005;

5. The parties stipulate to the wage found in the Award if the date of accident is determined to be May 30, 2003;
6. Claimant filed his E-1 with the Division of Workers Compensation on January 26, 2004;
7. Claimant has made no effort to find post-injury employment; and
8. The parties agree that if a wage is to be imputed, the $280 figure utilized by the SALJ is appropriate and not in dispute.

ISSUES

The SALJ concluded claimant sustained a compensable injury on May 30, 2003 and that his written claim, filed on February 3, 2004, was timely as respondent had failed to file an accident report as required by statute, thereby extending the time to assert a claim to one year. The SALJ went on to conclude that claimant sustained a 25 percent permanent partial whole body impairment as a result of that injury. And due to his inability to return to comparable employment, claimant had sustained a 62 percent work disability, based upon a wage loss of 47.2 percent and a task loss of 76.83 percent. Upon a cessation of the claimant's fringe benefits, the work disability increased to 66.41 percent. All of these benefits were to be paid by respondent and its carrier as of May 30, 2003, St. Paul.

The respondent and St. Paul request review of the SALJ's award alleging a variety of errors. First, St. Paul contends that if May 30, 2003 is the appropriate accident date (a conclusion that St. Paul disputes) then the claimant failed to file his claim within 200 days as required by K.S.A. 44-520a. St. Paul further contends that respondent's failure to file an accident report did not extend the time in which claimant had to file his claim because claimant missed no work as a result of the accident. Thus, St. Paul urges the Board to find claimant's claim as untimely.

Alternatively, St. Paul argues that the SALJ erred in concluding that May 30, 2003 was the claimant's date of accident. St. Paul maintains that claimant, as evidenced by the E-1 and the testimony contained within the file, sustained a series of accidents culminating in a compensable injury as of January 14, 2004, his last date of work at his regular duties. And based upon current case law, January 14, 2004 should be considered the date of accident. And as such, respondent and its carrier on that date, Zurich, are responsible for the Award rather than St. Paul. Finally, St. Paul maintains that claimant is not permanently and totally disabled and if anything, has sustained a work disability under K.S.A. 44-510e(a).

Respondent and Zurich urge the Board to affirm the SALJ's conclusion that May 30, 2003 was the claimant's date of accident. Rather than a series of accidents, Zurich maintains the claimant suffered a single acute injury on May 30, 2003, and all that followed was the natural and probable consequence of that original injury, primarily because claimant received no treatment and quite naturally did not improve and continued to work. Zurich also joins in St. Paul's argument that claimant failed to file his written claim in a timely manner.

Claimant argues he is permanently and totally disabled as a result of his work-related injury and advocates a date of accident of January 14, 2004 (the date light duty was imposed) or February 18, 2004 (the date a physician took him off work).[1] Based on either of these dates, claimant argues he is entitled to the maximum weekly benefit based upon the evidence as to his base wages, overtime and fringe benefits.[2]

Alternatively, if May 30, 2003 is determined to be the accident date, then claimant concedes St. Paul is the appropriate carrier and contends he is not time barred. Rather, claimant's E-1 was timely because respondent failed to file the requisite accident report thereby extending the time in which claimant had to file his claim.

The issues to be resolved in this appeal are as follows:

1. The claimant's date of accident;
2. Whether claimant submitted a timely written claim;
3. The nature and extent of claimant's resulting impairment, including his entitlement to work disability or permanent total disability;
4. Claimant's average weekly wage;
5. Payment of certain medical bills to a medical provider in Georgia; and
6. The need for reimbursement as between the carriers, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the SALJ's Award should be modified.

There is no significant dispute amongst the parties that the claimant was injured while in respondent's employ. Rather, the difficulty in this dispute arises out of the nature of his injury and ongoing complaints, his failure to immediately file a claim at the first sign of injury and the fact that respondent changed carriers during the course of this chain of events.

The SALJ set forth, in great detail, all the facts and circumstances relative to this claim and the Board finds it unnecessary to repeat them herein. Therefore, the Board adopts the SALJ's statement of facts as its own, insofar as they are consistent with the findings of fact and conclusions of law contained herein, and will only refer to those relevant facts as necessary.

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[1] Based upon the parties' stipulations, Zurich would be responsible for benefits owed for accidents on either of these dates.

[2] Claimant stipulates to the wage found in the Award if the Board decides to affirm the SALJ's conclusion as to the May 30, 2003 date of accident.

Resolution of this claim begins with a determination of the appropriate date of accident. Not surprisingly, the carriers each advocate opposing positions with respect to claimant's date of accident. St. Paul suggests claimant had a series of accidents which, under *Treaster*[3], would culminate in an accident date of January 14, 2004[4], claimant's last day of work before he was placed on restrictions. Conversely, Zurich advocates a single acute injury occurring on May 30, 2003.

The Board has considered the entire record and concludes that claimant sustained two separate accidents while in respondent's employ. The first occurred on May 30, 2003 and the other occurred over a series of dates culminating on January 14, 2004. It is clear from the evidence that claimant hurt his back on May 30, 2003 while cleaning out a railroad car. He was sent home that day and told to put ice on it. He not only had an acute onset of back complaints, but radiating pain into his legs as well. The diagnosis and treatment of this injury became rather convoluted because claimant was already undergoing treatment for a bilateral knee problem and his leg complaints were apparently similar in nature to those he had been expressing to his physician well before the May 30, 2003 accident.

After May 30, 2003 and up until August 2003, claimant continued working his regular duties, performing the very physical job duties of cleaning out train cars. There is some suggestion in the file that claimant's back symptoms subsided. Sometime in August 2003 he suffered a temporary flare-up of his low back and leg symptoms and again in October 2003. Claimant continued working and said nothing to his employer.

Claimant's personal physician continued to treat his leg complaints with cortisone shots to the knee, but when he did not improve, an MRI was finally ordered for his low back and was performed in December 2003. The MRI showed a herniated disk at L3-4 and degenerative changes of the vertebral bodies. Claimant was referred to Dr. Grundmeyer who put him on light duty as of January 14, 2004, following a third and more longstanding flare-up of his symptoms claimant was taken off work effective February 18, 2004.

Based upon these facts, the Board finds claimant has sustained two separate accidents with the first on May 30, 2003, and the second culminating on January 14, 2004. Although respondent and Zurich contend this case is governed by the principles set forth in *Logsdon*[5], the Board disagrees. The evidence, albeit less than clear, strongly suggests that after the May 30, 2003 accident, claimant's back symptoms subsided and his knees continued to give him pain. Claimant had already been receiving treatment for those complaints before the May 30, 2003 accident and those complaints were not related to his earlier knee problems. Claimant was treated for that bilateral knee pain, but in December

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[3] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[4] At some points in the record, January 14, 2004 is the date light duty began.

[5] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

2003, after two separate flare-ups and months of regular duty, he was diagnosed with a herniation. Based upon this evidence, this claim is wholly distinguishable from the scenario involved in *Logsdon* where the claimant's shoulder complaints never resolved. Accordingly, the Board believes *Logsdon* is not applicable.

There is no dispute that the second claim, occurring on January 14, 2004, was timely filed. However, respondent and St. Paul contend the first claim from May 30, 2003 was not filed timely as required the Act.

The written claim statute, K.S.A. 44-520a, provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[6]

The parties agree that an Application for Hearing was filed with the Division of Workers Compensation on January 26, 2004. Consequently, written claim was served more than 200 days, but less than one year from claimant's date of accident. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge. Subsection (c) of K.S.A. 44-557 provides:

> (c) No limitation of time in the workmen's compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

K.S.A. 44-557(a) states in part:

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[6] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

> It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.

If the employer knows of the accident and if the employee was wholly or partially incapacitated for more than the remainder of the day, shift or turn on which he was injured, the failure to file an accident report would extend the written claim time to "one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee . . ."[7]

Respondent and St. Paul maintain first, that claimant was not incapacitated for more than the remainder of the day. Thus, they argue no accident report was necessary and the time in which claimant was required to report his accident was limited to 200 days. Claimant counters with the assertion that he did lose time from work as a result of this accident, taking not only the balance of the day off, but various dates thereafter when he suffered from low back and leg symptoms.

After a careful review of the record, the Board agrees with respondent and St. Paul and concludes claimant failed to serve claim within 200 days as required by statute. When claimant was questioned about his May 30, 2003 accident, he testified that although he left work immediately after it happened, he returned to work the next regularly scheduled day. In fact, he testified he "never missed a day" and continued to perform his regular work duties, including overtime.[8] While claimant may say that he missed work at various times due to his back, the record does not indicate when those dates were, nor how many times that occurred.[9] Based upon this record, it is difficult to resolve this inconsistency. And because claimant has the burden of proof in this matter[10], the Board concludes that claimant did not establish that it is more likely than not that he missed work due to his May 30, 2003 back injury.

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[7] K.S.A. 44-557(c).

[8] R.H. Trans. at 32-33.

[9] P.H. Trans. (Mar. 18, 2004) at 22.

[10] K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

It follows then that respondent was not statutorily required to file an accident report and any claim for compensation should have been filed within 200 days of May 30, 2003. Because that was not done, any claim this claimant might have had arising out of his May 30, 2003 accident has been extinguished. As a result, the only claim remaining is that asserted against respondent and its carrier, Zurich, for an accident culminating on January 14, 2004.

The parties have agreed that the claimant bears a 25 percent whole body permanent partial impairment as a result of his second accident. When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[11] and *Copeland*.[12] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[13]

The SALJ concluded, based upon the task loss analyses offered by Drs. Grundmeyer, Stein and Fevurly, that claimant bore a 76.83 percent task loss. The SALJ went on to conclude that claimant failed to make a good faith effort to find appropriate post-injury employment. Accordingly, he imputed a wage of $280 per week (based upon an hourly wage of $7.00) which yields a wage loss of 47.2 percent when compared to an average weekly wage of $534.61.[14] And when those two resulting figures are averaged, the resulting work disability is a 62 percent. When the fringe benefits ceased to be provided on August 6, 2004, claimant's average weekly wage increased by $107.11 per week, and therefore the wage loss increased to 56 percent, making claimant's work disability 66.41 percent. Although he did not expressly say so, the SALJ apparently concluded that claimant was not permanently and totally disabled under K.S.A. 44-510c(a)(2).

Claimant maintains both Drs. Stein and Grundmeyer have opined that it would be very difficult for claimant to work given his present condition, post fusion surgery. And as a result, claimant maintains he is permanently and totally disabled. Conversely, respondent and Zurich contend the task loss analysis adopted by the SALJ reflects an inflated view of claimant's task loss because the opinions take into account claimant's self-imposed restrictions of lying down during the day.

The Board has considered the record as a whole and like the SALJ, concludes that claimant is not permanently and totally disabled. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

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[13] *Id.* at 320.

[14] Although the percentage of wage loss is slightly off, these are the figures contained within the Award.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[15]

In *Wardlow*[16], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The *Wardlow* Court looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision of whether the claimant was permanently totally disabled.

Here, the Board is persuaded that claimant is capable of working. Both vocational specialists have testified that claimant is capable of performing substantial gainful employment at rates varying from $6.50 to as much as $9.46 per hour. Although some of the physicians have indicated that it is understandable that claimant would rest during the day (because he has had a multi-level fusion) none of those physicians have expressly imposed such a restriction. Under these facts and circumstances, the Board has no difficulty concluding that claimant is capable of working, albeit not at the work he was formerly employed. Thus, he is not entitled to permanent total disability benefits.

Claimant is, however, entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a) because he has been unable to return to employment at a comparable wage. The SALJ averaged the task loss opinions offered by some of the various physicians and the Board finds no reason to disturb that finding. Certainly claimant may have some difficulty finding employment given his physical restrictions. Nonetheless, the Board finds the SALJ's task loss finding of 77 percent[17] is reasonable and takes into account the various opinions expressed the physician. Thus the SALJ's task loss finding is essentially affirmed.

As for the wage loss component of the formula, the SALJ's conclusions must be modified because the date of accident has been altered and claimant's pre-injury wage must be calculated based upon a date of accident on January 14, 2004. According to the wage statement provided by counsel for Zurich, claimant's base wages (based upon an accident date of January 14, 2004) was $458.28. He had an average overtime of $87.52 per week. This yields an average weekly wage of $545.80. As of August 6, 2004, the average weekly wage increases to $652.91 reflect the cessation of the fringe benefits.

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[15] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[16] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[17] The SALJ actually found 76.83 percent, but the Board has rounded this figure to 77 percent.

Because claimant has made no effort to find post-injury employment, the Board is authorized to impute a wage based upon *Copeland.* The parties agreed that if a wage was imputed, the $280 utilized by the SALJ was appropriate. Thus, claimant's wage loss is 49 percent from February 18, 2004 (claimant's last date worked) up to August 6, 2004, when it increased to 57 percent.

When those figures are averaged with the task loss, the result is a 63 percent work disability from February 18, 2004 up to August 6, 2005, when the work disability increases to 67 percent. The SALJ's Award is modified to reflect these new findings and figures.

Neither party disputes the claimant's entitlement to temporary total disability benefits from February 21, 2004 to August 5, 2005. Thus, that aspect of claimant's Award is affirmed.

The Board likewise agrees with the SALJ with respect to claimant's unilateral decision to obtain medical treatment after his move to Georgia. Respondent designated a physician as required by the Court. There may have been some difficulty with the extent of the physician's authority to treat claimant and if so, the parties should have sought assistance from the Court. When a treating physician has been authorized, as here, it is not claimant's prerogative to go on his own elsewhere for treatment absent some sort of emergency situation.

Finally, St. Paul is entitled to reimbursement for those monies it paid relative to this claim as the Board has determined that the permanency is attributable to the January 14, 2004 accident, a date for which St. Paul had no responsibility.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John Nodgaard dated August 17, 2006, is reversed and modified as follows:

The claimant is entitled to an Award against respondent and Zurich for an accidental injury arising out of and in the course of his employment on January 14, 2004 as follows:

The claimant is entitled to 76.00 weeks of temporary total disability compensation at the rate of $305.54 per week or $23,221.04 followed by 81.29 weeks of permanent partial disability compensation at the rate of $305.54 per week or $24,837.35 for a 63 percent work disability followed by permanent partial disability compensation at the rate of $435.30 per week not to exceed $100,000.00 for a 67 percent work disability.

As of January 31, 2007 there would be due and owing to the claimant 76.00 weeks of temporary total disability compensation at the rate of $305.54 per week in the sum of $23,221.04 plus 81.29 weeks of permanent partial disability compensation at the rate of $305.54 per week in the sum of $24,837.35 for a total due and owing of $48,058.39, which

is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $51,941.61 shall be paid at the rate of $435.30 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and Zurich
John David Jurcyk, Attorney for Respondent and St. Paul
John Nodgaard, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge